

REMCHO, JOHANSEN & PURCELL, LLP
ATTORNEYS AT LAW

201 DOLORES AVENUE
SAN LEANDRO, CA 94577
PHONE: (510) 346-6200
FAX: (510) 346-6201
E-MAIL: twillis@com
WEBSITE: www.rjp.com

SACRAMENTO PHONE: (916) 264-1818

Joseph Remcho (1944-2003)
Robin B. Johansen
Kathleen J. Purcell (Ret.)
James C. Harrison
Thomas A. Willis
Karen Getman
Margaret R. Prinzing
Karl Krogseng

December 15, 2008

VIA FEDERAL EXPRESS & FACSIMILE

Jeff Jordan
Office of General Counsel
Federal Election Commission
999 "E" Street, NW
Washington, DC 20463

Re: *MUR 6094*

Dear Mr. Jordan:

We represent The American Leadership Project (ALP) in the above-mentioned matter filed by Democracy 21.¹ Respondents request that this matter remain confidential in accordance with 2 U.S.C. section 437g(a)(4)(B).

INTRODUCTION

Democracy 21's complaint raises the same allegations made by Obama for America in MUR 6004. ALP responded to MUR 6004 on June 13, 2008, showing that Obama for America failed to allege any facts or law establishing a violation of federal campaign finance laws. Democracy 21's complaint must be dismissed for the same reasons.

The complaint here alleges that ALP is a political committee within the meaning of the Federal Elections Campaign Act (FECA or Act), and therefore is required to register and report its activity as a political committee and comply with the Act's source and contribution restrictions. Importantly, complainant does not contend, much less attempt to demonstrate, that ALP's communications failed to meet the requirements for electioneering communications established by *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (June 25, 2007) ("*WRTL*") and the FEC's recent rulemaking, 72 Fed. Reg. 72899. To be sure, complainant (unlike Obama for

¹ Respondents have already filed their designation of counsel form with the FEC.

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America) alleges, in the alternative, that ALP's communications amount to the functional equivalent of express advocacy but that argument is foreclosed by the fact that, as complainant implicitly concedes, ALP's communications meet the FEC's safe-harbor rule for electioneering communications. That safe-harbor applies only if a communication is not express advocacy or its functional equivalent.

Complainant also does not dispute that ALP operates independently from any candidates, does not make any contributions to candidates, and does not coordinate with any candidates. In short, ALP does not engage in any federal campaign activity. Thus, complainant is in the untenable position of arguing that ALP is a political committee even though it has never engaged in any federal campaign activity or made any federal political expenditures.

Undeterred, complainant argues ALP is a political committee because ALP's "major purpose" brings it within the Act. But that argument is unavailing because ALP has not spent any money on federal election activity and its major purpose is to advocate about economic issues rather than for particular candidates. More fundamentally, Democracy 21's arguments fail because they are tortured attempts to bring ALP within the Act despite the fact that ALP has never engaged in any federal campaign activity. Given this, complainant's efforts to bootstrap ALP into the mandates of the Act are unsupported by the Act and would be unconstitutional.

ANALYSIS

I. ALP is Not a Political Committee Under the Act

The test for when an entity becomes a political committee under the Act is well known. A political committee is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or makes expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A). Contributions and expenditures are further limited to receipts and disbursements made "for the purpose of influencing any election for Federal Office." 11 C.F.R. § 100.5(a). That is not all. The United States Supreme Court has further narrowed those definitions in two important ways to avoid constitutional issues. First, in *Buckley v. Valeo* (1976) 424 U.S. 1, 79 and its progeny, the Court has stated that only expenditures for express advocacy or its functional equivalent can trigger political committee status under the Act. Second, as the FEC has stated, "to avoid the regulation of activity 'encompassing both issue discussion and advocacy of a political result' only organizations whose major purpose is Federal campaign activity can be considered political committees under the Act." 72 Fed. Reg. 5595, 5601 (2007) (citation omitted). "Thus, the major purpose test serves as an additional hurdle to establishing political committee status. Not only must the organization have raised or spent \$1,000 in contributions or expenditures, but it must additionally have the major purpose of engaging in federal campaign activity." *Id.* (emphasis added).

Therefore, an entity only becomes a political organization if it raises \$1,000 in contributions or spends \$1,000 in expenditures. If those thresholds are not met, an entity does

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not become a political committee. Put differently, the major purpose test is not – and cannot be – a catch-all, alternative test that brings an entity within the Act even if that entity has never received federal contributions or made federal expenditures. To hold otherwise would mean that an entity that engages exclusively in issue-based electioneering communications could nonetheless become subject to the reporting requirements and source and contribution restrictions of the Act. That of course would be unconstitutional in light of *WRTL*.

Viewed under these standards, the complaint's lack of merit quickly becomes apparent: complainant does not really argue that ALP has ever made any political expenditures and its evidence that ALP has accepted federal contributions is nonexistent. These are the only two routes to political committee status, and neither exists here.

A. ALP Has Not Made Any Expenditures Under the Act

ALP is not a political committee through its expenditures. ALP has engaged in significant issue-based electioneering communications but it is telling that complainant does not contend that any of those communications: (1) are coordinated with any federal candidate; or (2) fail to comply with the safe-harbor for electioneering communications set forth in both *WRTL* and the FEC's extensive Rulemaking for such communications. In short, ALP has made no expenditures under the Act and complainant does not contend otherwise.

Complainant does contend, in the alternative, that ALP's communications may be considered express advocacy or its functional equivalent. *See* Complaint, ¶ 51. But the argument is meritless on its face. ALP's ads comply with the safe-harbor for electioneering communications set forth in both *WRTL* and the FEC's extensive Rulemaking for such communications. It is telling that the complaint does not discuss either *WRTL* or the FEC's electioneering communication regulations. In order for a communication to come within the safe-harbor, it cannot contain express advocacy or its functional equivalent. Moreover, ALP's communications lack the "usual markers of express advocacy" because they do not reference any person's candidacy, compare candidates, or discuss any candidate's character. *See* Draft Advisory Opinion 2008-15, for October 23, 2008 meeting, at 7. Thus, complainant's argument that any of ALP's communications contain express advocacy or its functional equivalent is meritless.

Finally, it is important to note that since Democracy 21 filed its complaint on October 10, 2008, the FEC has issued Advisory Opinion 2008-15, which further supports the conclusion that ALP has not made any expenditures under the Act.² Specifically, the Commission found that a radio advertisement entitled "Waiting for Obama's Apology #1" did not contain express advocacy or its functional equivalent and therefore could be financed from a

² The Advisory Opinion makes clear the FEC's continued support for the safe-harbor regulation for electioneering communications. *See* 11 C.F.R. § 114.15.

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501(c)(4) entity's general treasury funds, without restrictions. The "Waiting for Obama's Apology #1" advertisement has precisely the same characteristics as ALP's communications. ALP's communications do not mention the candidacy of any person, do not compare candidates, or discuss the character of any candidate. In addition, ALP's communications both discuss public policy issues or legislation and urge action with respect to those issues. Thus, as was the case with "Waiting for Obama's Apology #1", ALP's communications are not express advocacy or its functional equivalent and qualify under the safe-harbor for electioneering communications. Advisory Opinion 2008-15 makes clear that ALP has not made any expenditures under the Act.

B. ALP Has Not Solicited Any Contributions under the Act

ALP is also not a political committee through its contributions. An entity becomes a political committee under the Act if it receives money in response to a communication that indicates some or all of the money "will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a). Complainant asks the FEC to investigate whether funds raised by ALP were in "response to any solicitation that indicated that any portion of the funds received would be used 'to support'" various Presidential candidates. Complaint, ¶ 52. Complainant cites no facts to support its request: it points to no fundraising materials or statements by ALP representatives suggesting that funds will be used to support or oppose a clearly identified candidate.

Instead, complainant implicitly argues that ALP may have violated section 100.57 because ALP's organizers are tied to the Clintons and some of its donors have also given to Hillary Clinton's presidential campaign. But the identity of ALP's organizers and donors has nothing to do with whether ALP's solicitations stated that funds would be used to elect or defeat a particular candidate, and that is the only relevant question under section 100.57. Moreover, the mere fact that there is some convergence of donors between ALP and the Clinton campaign, even if true, is not sufficient as a matter of law to establish any formal relationship between the two or that ALP is a political committee. *See, e.g., FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 865 (1996) (rejecting argument that GOPAC was a political committee because of overlap between donors to it and the Newt Gingrich campaign committee).

Complainant also misreads the applicable standard. For purposes of determining political committee status, a contribution comes within the Act only if it "will be converted to expenditures subject to regulation under FECA." *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295. Donations that flow from a solicitation are contributions under the Act only if "they leave no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat his policies during the election year." *Id.* ALP's solicitation materials do not remotely suggest that funds would be used to advocate the election or defeat of a candidate. ALP's fundraising has not mentioned any federal candidate and instead simply mentions the issues it sought to discuss. ALP's fundraising efforts are not at all similar to the fundraising efforts discussed in the Swiftboat Vets, MoveOn, and League of Conservation Voters conciliation agreements, all of which made clear that the money raised would support the election or defeat of a particular candidate.

Moreover, the FEC approved section 100.57 before the Court's *WRTL* decision last term, and it sweeps too broadly in light of that decision. Briefly, if ALP's communications are not express advocacy or the functional equivalent of express advocacy and therefore are not expenditures under the Act, contributions to support those communications cannot convert ALP into a political committee. If that were the case, an organization would be required to report its activity and comply with the Act's source and contribution restrictions even if it never engaged in express advocacy or, for that matter, electioneering communications. In deciding *WRTL*, the Court repeatedly stated that an entity's ability to run issue ads cannot turn on the entity's intent or the effect of the ads. "Under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *WRTL*, 127 S. Ct. at 2666. Thus, under *WRTL*, a contributor's motivation for making a contribution is irrelevant. Rather, it is the communication itself, not the intent of the speaker or the donor that determines whether the speaker becomes a "committee." If the donation is used to buy genuine issue ads, as is the case here, the entity to which the donor gave cannot be considered a political committee regardless of what the donor thought when he or she made the contribution; if the donation is used for express advocacy or its functional equivalent, then the entity is a political committee regardless of the donor's intent.

C. ALP Is Not a Political Committee Under the "Major Purpose" Test

Complainant also claims that ALP is a political committee under the "major purpose" test. Complaint, ¶¶ 44-46. As an initial matter, complainant misreads the scope of that test. As the FEC has stated, the major purpose test is an "additional hurdle" in finding that an entity is a political committee; the contributions and/or expenditure thresholds must be met first. Here, however, ALP has not received or spent any federal contributions or expenditures, and therefore it is not a political committee. There is therefore no need to determine ALP's major purpose. In fact, a rule that would result in an entity becoming a political committee even though it received no contributions and made no political expenditures would be flatly unconstitutional.

ALP's major purpose, as articulated by the group itself, is not the election or defeat of a particular candidate, but rather "to raise public awareness of vital public policy issues affecting America's middle class – the economy and jobs, tax fairness, health care reform, public education, trade policy, and the mortgage crisis, among others – against the high-visibility backdrop of closely-contested primary elections." ALP's communications do not contain express advocacy or the equivalent of express advocacy as those terms have been interpreted by the U.S. Supreme Court in *WRTL* and the FEC's subsequent rulemaking – neither of which is discussed in the complaint.

Complainant contends that ALP's status as a section 527 organization under the Internal Revenue Code entity is prima facie proof that it is a political committee under FECA. Complaint, ¶ 46. But the FEC has expressly rejected that argument, declining to promulgate a rule requiring all 527 organizations to register as political committees. Its decision in this regard was upheld by the U.S. District Court in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007). As the FEC

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stated during its rulemaking, "[a]n organization's election of section 527 tax status is not sufficient evidence in itself that the organization satisfies FECA and the Supreme Court's contribution, expenditure and major purpose requirements." 72 Fed. Reg. 5595, 5598 (2007). The reason is that "tax law is not a very good mechanism for differentiating between election-focused and ideological groups." 72 Fed. Reg. at 5598 (citation omitted).

The only other evidence complainant points to are press reports suggesting that ALP was created to help the candidacy of Hillary Clinton. Those conclusions, however, are not based on any statements attributable to ALP representatives. In any event, even if the newspaper claims were correct (they are not) and were based on statements from ALP representatives (they are not), they would not be evidence on which a trier of fact could rely for the purpose of finding ALP is a political committee. *GOPAC*, 917 F. Supp at 864.

* * * * *

In sum, ALP has at all times been well aware of its obligations under the Act and other laws and has worked hard to make sure its conduct and message complied with those laws. Complainant's unsubstantiated allegations are rebutted by the facts that ALP has been engaged in communications regarding economic issues, has operated independently of any candidates, has not engaged in express advocacy or its functional equivalent, and has not raised or spent funds in a manner that would make it a political committee under the Act. The complaint should be dismissed without further action. If you would like additional information, please do not hesitate to contact us.

Sincerely,



Thomas Willis

TAW:NL
(00069831)

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